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CHARLES ELMORE CROPLEY
LAW

IN THE
Supreme Court of the United States

No. 722

October Term, 1945.

CARL McINTIRE; YOUNG PEOPLE'S CHURCH OF THE AIR, INC., a corporation; WORD OF LIFE FELLOWSHIP, INC., a corporation; THEODORE ELSNER, E. SCHUYLER ENGLISH, HIGHWAY MISSION TABERNACLE, a corporation; WILEY MISSION, INC., a corporation; and WESLEYAN METHODIST CHURCH, a corporation,

vs.

WM. PENN BROADCASTING COMPANY OF PHILADELPHIA, owners and operators of Radio Broadcast-
ing Station "WPEN".

PETITIONERS' REPLY BRIEF

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Cases Cited:

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Sta-Shine Products Co. Inc. v. Station WGBB, 188 I. C. C. 271	3
Summit Hotel Co. v. National Broadcasting Co., 336 Pa. 182, 197	3

Authorities Cited:

Communications Act of 1934, 47 U. S. C., Section 414	2, 3
Federal Communications Act, 47 U. S. C., Section 402(a)	1



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The respondent's first point of argument is based upon that portion of the opinion of the court below which indicates that petitioners were relegated to an appeal from an order of the Commission under Section 402 (a) of the Federal Communications Act, 47 U. S. C., Section 402 (a). That argument is untenable for three reasons:

(a) : Section 402(a) permits the institution of an action in a Federal District Court to set aside, annul or suspend an order of the Commission. In the case at bar the negative action taken by the Commission, to wit the denial of the petition for relief, is obviously not such an order as contemplated by Section 402 (a). The setting aside, annulling or suspend-

ing of the Commission's action would not afford the petitioners the relief requested in this suit and to which they are entitled. The Federal Communications statute does not confer any jurisdiction upon the Federal Communications Commission to give relief to advertisers (sponsors) whose rights have been infringed or invaded by a broadcasting corporation.

(b) : The action of the Federal Communications Commission (Respondent's Brief, p. 5) is not based on anything contained in the transcript of record. There is nothing to indicate who complained to the Commission, what they complained about or the ground for the complaint. Whatever it was it was not before the District Court of the United States for the Eastern District of Pennsylvania which entered its final decree on April 19, 1945 (62-a). The decision of the Federal Communications Commission was made April 24, 1945 (Respondent's Brief, p. 5)—six days after the District Court judgment was entered.

(c) : A proceeding in the nature of a complaint before the Federal Communications Commission is no bar to a suit in the United States courts. Section 414 of the Communications Act of 1934, 47 U. S. C., Section 414 provides:

"Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

Point 2 of respondent's argument cites *Federal Trade Commission v. Raymond Bros.-Clark Co.*, 263 U. S. 565, 573. That case involved a wholesale dealer in and a manufacturer of groceries. While it is true that a private trader of ordinary commercial articles may exercise his independent discretion in the selection of those with whom he will deal,

the respondent here is not such a private trader—its activities and practices are limited and regulated by statute and by regulations of the F. C. C. It is the contention of the petitioners here that the respondent and all other similar broadcasting stations are public utilities already limited to a certain extent by statute and which may be further regulated by additional statutes. The respondent cites the case of *Summit Hotel Co. v. National Broadcasting Co.*, 336 Pa. 182, 197, for the principle that "the Supreme Court of Pennsylvania has explicitly stated that a radio broadcasting station is not a public utility" (Respondent's Brief, p. 10). That point was mentioned briefly in a rather long opinion and was not necessary to the decision. All that the court said there (p. 197) was "radio companies are not in that category (telephone and telegraph companies). They may select their performers and choose between applicants for the use of their facilities." The quoted language from the opinion cited does not sustain the statement of the brief. It is interesting to note that the authority cited in the opinion for the two-sentence statement is the case of *Sta-Shine Products Co. Inc. v. Station WGBB*, 188 I. C. C. 271, which case was decided before the enactment of the Communications Act of 1934 and construed the 1927 act.

Furthermore, it is not necessary in the Federal Courts to state a "cause of action". It is required only that the complaint state facts showing that the pleader is entitled to relief. The complaint here contains the necessary allegations, to wit (Record, pp. 22a-25a): That the petitioners have acquired property rights which respondent is seeking to destroy (Par. 6); that the respondent is barring the petitioners, forever, from competing for time on its program so long as they offer to pay for the time at the regular rates, even when time is available, but is giving time for similar religious broadcasts to applicants of its own choosing who pay nothing (Pars. 7 and 9 and Exh. A, p. 17a);

the respondent's refusal to permit the petitioners to broadcast (Par. 8); the respondent's refusal to allow the petitioners to bid for time and to pay for it (Par. 9); respondent's knowledge that petitioners could not obtain facilities on any other radio station and that the action it took would prevent the petitioners from broadcasting and prevent their large radio audience from hearing through them the gospel of Jesus Christ (Par. 10); that respondent was committing acts with the intent to discriminate illegally against petitioners (Par. 11); that respondent's breach of its contract with the petitioners was done maliciously and with the intent to discriminate illegally against the petitioners in particular and against the broadcasting of religious services in general except those of its own choosing (Par. 15); that the acts of respondent are in violation of the petitioners' constitutional rights of free speech and free exercise of religion; that petitioners are now being excluded from the air and as a result will lose their audiences and their audiences will be unable to receive the gospel message which they had been receiving continuously heretofore and that religious and charitable organizations and work heretofore supported by contributions will have to be discontinued or seriously curtailed (Par. 16).

Respectfully submitted,

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